No. 80-186

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT L. WRIGHT,
Petitioner,

versus

THE STATE OF GEORGIA,
Respondent.

On Petition for Writ of Certiorari to
The Court of Appeals of Georgia

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether or not the presumption as established in Georgia case law, which states that as between husband and wife there is a presumption of law that contraband found in the home . . . belongs to the husband, violates the husband's right of equal protection under the Fourteenth Amendment of the United States Constitution.

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PETITION FOR CERTIORARI

Petitioner, ROBERT L. WRIGHT, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of Georgia entered in this proceeding on April 10, 1980.

OFFICIAL OPINION OF THE COURT BELOW

Wright, et al v. The State, Number 59513, ____ Ga. App. ____; ____ SE 2d ____ (1980).

JURISDICTION

The original decision and judgment in the case of Robert L. Wright v. The State in the Court of Appeals of Georgia was rendered and filed on April 10, 1980. Within time provided by law, the Petitioner filed a Motion for Rehearing in the Court of Appeals of Georgia, said Motion being overruled and denied by the Court of Appeals on April 24, 1980. As provided by law and within time, the Petitioner filed an Application for Writ of Certiorari to the Supreme Court of Georgia, which was denied May 28, 1980. Petitioner filed a timely Motion for Reconsideration of his Application for Writ of Certiorari which was denied June 9, 1980. This Court's jurisdiction is invoked under Title 28, USC Sec. 1257(3).

THE CONSTITUTIONAL PROVISION INVOLVED AND THE STATE LAW UNDER ATTACK

The Constitutional Provision involved: The Equal Protection Clause of the Fourteenth Amendment:

> . . . no state shall make or enforce any law which shall . . . deny to any person in its jurisdiction the equal protection of the law.

The State Law under attack: *Harper v. The State*, 85 Ga.App. 252, 69 S.E.2d 102 (1952):

> As between husband and wife there is a presumption of law that (contraband) found in the home . . . belongs to the husband.

STATEMENT OF THE CASE

Petitioner and his wife were indicted May 29, 1979, by the Toombs County Grand Jury on a two-count Indictment charging Petitioner and his wife with possession with intent to distribute marijuana and possession of cocaine (R. 4-5). Petitioner and his wife were found guilty of the charges in the indictment (R. 4; T. 138-139).

The police entered the residence of the petitioner pursuant to a search warrant (T. 8-9). The Petitioner as well as his wife admitted at the trial that the residence was their home since 1972 (T. 99). As police entered the home through the front door, the Petitioner and a third party were either in the living room (T. 54, 85) or in a room next to the living room (T. 12).

The third party was observed to be smoking what appeared to police officers to be marijuana (T. 27). Petitioner admitted he was smoking marijuana at the time of the police raid, however he claimed that the marijuana belonged to the third party and further denied any knowledge of further marijuana in the house (T. 110). The police officer further observed

what appeared to be marijuana in an ashtray in the living room (T. 53-54).

Upon searching what appeared to be a child's bedroom, a police officer found a quantity of marijuana concealed under a pile of clothes in a chair (T. 13-14). The Petitioner's wife confirmed that this room was normally occupied by their child (T. 7).

Upo searching another bedroom, which appeared to be the master bedroom, marijuana was discovered in plain view on the top of the dresser (T. 32-34; 40, 42). A metric weighing device was also in plain view on the dresser (T. 32, 34) The items on the dresser could be easily observed from the door to the room (T. 49) and from several positions in the nearby kitchen (T. 50). The bedroom door was open when police arrived. (T. 51). Other items found on top of the dresser included a quantity of plastic bags and small brown envelopes (T. 33-37; 38). A tin can containing $1,399.00 (T. 35-36) and a cigar box containing $191.00 (T. 38-39), and another box containing $688.00 was discovered in a chest of drawers in the bedroom (T. 48). A small spoon bearing residue of cocaine was found in the closet in the same bedroom (T. 47). The Petitioner testified that the third party present when the police entered the room was the brother of the Petitioner and that he lived with the Petitioner and his wife for approximately a month and a half (T. 86-87; 109). They

further testified that he had a key to the house (T. 87; 109) and had full access to the house (T. 89). He alternately slept on the living room couch and in the child's bedroom (T. 88; 109).

The Petitioner and his wife were found guilty of the charges in the indictment (T. 138-139). Upon appeal, petitioner's wife's conviction based upon the presumption of Georgia Law that as between husband and wife it is presumed that the contraband found in their home belonged to the husband (Appendix, p. 3a). The jury was not charged as to the presumption (T. 123-136). The presumption was first applied by the Court of Appeals of Georgia in its original Opinion which affirmed the Petitioner's conviction.

REASONS FOR GRANTING THE WRIT

The Court of Appeals of Georgia in sustaining Petitioner's conviction on the presumption of law that as between husband and wife contraband found in the home . . . belongs to the husband violated Petitioner's right of equal protection.

The Petitioner and his wife occupied a rented home in which Petitioner's brother also resided. (T 86-87, 88, 99, 109) The evidence showed the brother had full access to the house. (T. 99). The Court of Appeals of

Georgia failed to reverse the Petitioner's conviction based on the "Equal Access" Doctrine as stated in *Reed v. The State*, 127 Ga.App. 458, 194 S.E.2d 121 (1972). The Court of Appeals in failing to reverse the Petitioner's conviction in regards to the equal access doctrine essentially held that the contraband either belonged to the petitioner or his wife.

As between the Petitioner and his wife, the Court of Appeals states "it is presumed that contraband found in their home . . . belonged to the (Petitioner)", since there was no evidence linking the contraband to the Petitioner's wife. (See Appendix, p. 3a). *Harper v. State*, 85 Ga.App. 252, 69 S.E.2d 102 (1952). Thus, the Petitioner's conviction was upheld based on the presumption that the contraband found in the home belonged to the husband.

The presumption upon which the Court of Appeals of Georgia used to uphold the Petitioner's conviction is unconstitutional in that it violates the Equal Protection Clause of the Fourteenth Amendment. The presumption of law as established by Georgia case law "provides that different treatment be accorded . . . on the basis of sex". Since the case law establishes a classification based on sex, it is subject to scrutiny under the Equal Protection Clause. *Reed v. Reed*, 404 U.S. 71, 75; 92 S.Ct. 251, 253 (1971). The classification is subject to scrutiny even though it expressly discriminates against the male gender rather than the female gender. *Craig v. Boren*,

429U.S. 190; 97S.Ct. 451 (1976). The classification by gender will not withstand scrutiny under the Equal Protection Clause unless it serves some "important governmental objectives" and it is "substantially related to achievement of those objectives." *Califano v. Webster*, 430 U.S. 313, 316-317; 97 S.Ct. 1192, 1194 (1970).

The presumption used in sustaining Petitioner's conviction is based on "the doctrine that when husband and wife live together, the house in which they live and all property in the house, are in the legal possession of the husband as the head of the family". *Smith v. Berman*, 8 Ga.App. 262, 271; 68 S.E. 1014, 1021 (1910); *Young v. The State*, 22 Ga.App. 111; 95 S.E. 478 (1918); *Harper v. State*, 85 Ga.App. 252; 69 S.E.2d 102 (1952). The objective of the presumption is to place the family responsibilities upon the husband, with the wife playing the dependent role. As has been held by this court in *Stanton v. Stanton*, 421 U.S. 7; 95 S.Ct. 1373 (1975); *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102 (1979), the concept that generally it is the male's primary responsibility to provide a home and the essentials for his family can no longer justify a law that discriminates on the basis of gender. The presumption used to sustain the Petitioner's conviction being based on such a concept is violative of the Equal Protection Clause and unless the Decision of the Court of Appeals of Georgia is reversed, the Court will allow a manifest injustice to go unremedied.

CONCLUSION

In view of the controlling Supreme Court authority cited above, the Court of Appeals of Georgia erred in upholding the Petitioner's conviction based on the unconstitutional presumption of Georgia Case law that as between husband and wife contraband found in their home belongs to the husband.

It is respectfully submitted that the Opinion of the Court of Appeals of Georgia was in error and Petitioner's conviction should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served three copies of the foregoing Petition for Writ of Certiorari to the Court of Appeals of Georgia upon:

Mr. Richard A. Malone
Assistant District Attorney
Middle Judicial Circuit
P.O. Box 286
Swainsboro, GA 30401

by depositing same, in a properly addressed envelope, with adequate postage thereon, in the United States Mail as per United States Supreme Court Rule 28.2 and 28.5(b).

This is to further certify that all parties required to be served have been served.

This ___ day of August, 1980.

Paul W. Calhoun, Jr.
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APPENDIX

Apr. 10, 1980

59513. WRIGHT et al v. THE STATE.

DEEN, Chief Judge.

Robert and Cynthia Wright were convicted by a jury of two counts of violating the Georgia Controlled Substances Act. (Possession of marijuana with intent to distribute and possession of cocaine.) Cynthia was sentenced to seven years on each count to be served concurrently with the last four years on probation and a $500 fine to be paid six months after release from prison. Robert was sentenced to nine years on each count to be served concurrently with the last four years on probation and a $500 fine to be paid six months after release from prison. They bring this appeal following the denial of their motion for a new trial.

1. They first assert the general grounds. The evidence showed that a police officer had probable cause to obtain a search warrant for a house rented by Robert Wright. When the warrant was executed, the Wrights and Robert Wright's brother were sitting in the living room and the men were smoking marijuana. During the ensuing search, two plastic bags containing approximately two pounds of marijuana were found beneath some clothing on a chair in a child's bedroom, a small quantity of marijuana was discovered in plain view on top of a dresser in the master bedroom along

with a metric scale, some ziplock plastic bags, several small brown "coin" envelopes, a tin can containing $1,399 and a cigar box containing $199. A box containing $1,688 was found in a drawer containing women's underclothes and a small silver colored spoon bearing 1.5 grams of cocaine residue was found in the master bedroom closet. Appellants testified that Robert Wright's brother had resided with them for one and one-half months, that he had full access to the house including keys to the house, their car and their barbecue business, and that he slept in the child's bedroom.

It is well established that "[a]s between husband and wife there is a presumption of law that [contraband] found in the home . . . belongs to the husband. . . But such a presumption cannot be broadened to include all relatives who may be living in the same house with the defendant" and have equal access to it. *Harper v. State*, 85 Ga.App. 252, 254 (69 S.E.2d 102) (1952). The equal access rule applies to contraband that is for the most part in "open, notorious and easily accessible areas." *Kenerbler v. State*, 137 Ga.App. 618 (224 S.E.2d 476) (1976). In the present case, appellants have affirmatively shown that Robert's brother had an equal opportunity to possess the marijuana found in the child's room. *Brown v. State*, 130 Ga.App. 11 (202 S.E.2d 268) (1973). However, as to the marijuana found in plain view on top of the dresser in the master bedroom, Robert Wright's admission that he occupied the room and that he was

smoking marijuana when the police arrived would authorize a jury to find that he possessed the contraband. *Tuggle v. State*, 149 Ga.App. 634 (____ S.E.2d ____) (1979). As between Cynthia and Robert Wright, it is presumed that the contraband found in their bedroom belonged to Robert, *Harper v. State*, supra, and there was no evidence to link Cynthia to possession of either the marijuana or the spoon bearing cocaine residue and her conviction must be reversed.

While mere possession of contraband without more will not serve as the basis for a conviction for possessing contraband for purposes of sale, *Crider v. State*, 98 Ga. App. 164 (105 S.E.2d 506)(1958), Robert Wright's testimony that the scale, plastic bags, coin envelopes, and cash found on top of the dresser belong to him would authorize a jury to infer that he possessed marijuana with intent to sell it. *Bell v. State*, 35 Ga. App. 465 (134 S.E. 120)(1926).

2. Appellants next contend that the amount of cocaine (1/200th of an ounce) found on the spoon was insufficient to constitute an offense under Georgia law. As an expert witness from the State Crime Laboratory was able to identify the residue on the spoon as cocaine, a sufficient quantity of contraband was present to support Robert Wright's conviction for possession. *Partain v. State*, 139 Ga. App. 325 (228 S.E.2d 292)(1976).

3. In their final argument, appellants contend that the trial court erred by imposing a $500 fine upon each as a condition of probation. Under Code Ann. §27-2529, a judge may "by any law so authorizing, place on probation any person convicted of a felony, such judge may in his discretion fine such a person so convicted not more than $2,000 as a condition to such probation." This enumeration is without merit as to Robert Wright.

Accordingly, Robert Wright's convictions are affirmed and Cynthia Wright's are reversed.

Judgment affirmed in part and reversed in part. Birdsong and Sognier, JJ., concur.

COURT OF APPEALS
of the State of Georgia

ATLANTA, April 24, 1980

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

59513 Robert L. Wright et al v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta, Apr. 24, 1980

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS
CLERK.

CLERK'S OFFICE
SUPREME COURT OF GEORGIA

Atlanta, May 28, 1980

Dear Sir:

Case No. 36420 Wright v. The State

The Supreme Court today denied the writ of certiorari in this case. All the justices concur, except Hill, J., dissents.

Very Truly yours,
MRS. JOLINE B. WILLIAMS, Clerk

CLERK'S OFFICE
SUPREME COURT OF GEORGIA

Atlanta, June 9, 1980

Dear Sir:

The motion for a reconsideration was denied today:

Case No. 36420. Wright v. State

Undercofler, C.J., Hill & Clarke, JJ., dissent.

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk

60 days
Aug. 8